

ESTTA Tracking number: **ESTTA260563**

Filing date: **01/14/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	PEPSICO, INC.
Granted to Date of previous extension	03/25/2009
Address	700 ANDERSON HILL ROAD PURCHASE, NY 10577 UNITED STATES

Attorney information	Paul J. Reilly Baker Botts LLP 30 Rockefeller Plaza, 44th Fl. New York, NY 10112 UNITED STATES paul.reilly@bakerbotts.com, nytmdpt@bakerbotts.com, amy.waldron@bakerbotts.com, wykysa.fulton@bakerbotts.com, lauren.emerson@bakerbotts.com Phone:212.408.2634
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Applicant Information

Application No	77511291	Publication date	11/25/2008
Opposition Filing Date	01/14/2009	Opposition Period Ends	03/25/2009
Applicant	kaneta-ogata, bryce 336 Uilama Place Hilo, HI 96720 UNITED STATES		

Goods/Services Affected by Opposition

Class 039.

All goods and services in the class are opposed, namely: On-line computer services for storing content items selected by users from Internet web pages

Grounds for Opposition


Priority and likelihood of confusion	Trademark Act section 2(d)
Dilution	Trademark Act section 43(c)

Marks Cited by Opposer as Basis for Opposition


U.S. Registration No.	824150	Application Date	09/09/1966
Registration Date	02/14/1967	Foreign Priority Date	NONE

Word Mark	PEPSI
Design Mark	
Description of Mark	NONE
Goods/Services	Class U045 (International Class 032). First use: First Use: 1911/11/21 First Use In Commerce: 1911/11/21 SOFT DRINKS AND SYRUPS AND CONCENTRATES FOR THE PREPARATION THEREOF


U.S. Registration No.	824151	Application Date	09/09/1966
Registration Date	02/14/1967	Foreign Priority Date	NONE
Word Mark	PEPSI-COLA		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class U045 (International Class 032). First use: First Use: 1898/00/00 First Use In Commerce: 1898/00/00 SOFT DRINKS AND SYRUPS AND CONCENTRATES FOR THE PREPARATION THEREOF		

U.S. Registration No.	2100417	Application Date	07/26/1996
Registration Date	09/23/1997	Foreign Priority Date	NONE
Word Mark	PEPSI		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 1996/11/00 First Use In Commerce: 1996/11/00 soft drinks		

U.S. Registration No.	2104304	Application Date	07/26/1996
Registration Date	10/07/1997	Foreign Priority Date	NONE
Word Mark	PEPSI		

Design Mark	
Description of Mark	NONE
Goods/Services	Class 032. First use: First Use: 1996/11/00 First Use In Commerce: 1996/11/00 soft drinks

U.S. Registration No.	2751344	Application Date	06/18/2001
Registration Date	08/12/2003	Foreign Priority Date	NONE
Word Mark	PEPSI EZPAY		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 036. First use: First Use: 2003/04/02 First Use In Commerce: 2003/04/02 COMPUTERIZED ON-LINE PAYMENT SERVICES, NAMELY, THE ELECTRONIC PROCESSING AND TRANSMISSION OF BILL PAYMENT INFORMATION VIA A GLOBAL COMPUTER NETWORK		

U.S. Registration No.	3082353	Application Date	04/22/2005
Registration Date	04/18/2006	Foreign Priority Date	NONE
Word Mark	PEPSI SMASH		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 041. First use: First Use: 2005/06/01 First Use In Commerce: 2005/06/01 ENTERTAINMENT SERVICES, NAMELY, PROVIDING PRE-RECORDED OR LIVE MUSIC AND INFORMATION ABOUT MUSICAL ARTISTS ON-LINE VIA A GLOBAL COMPUTER NETWORK		

Attachments	75140200#TMSN.gif (1 page)(bytes) 75140203#TMSN.gif (1 page)(bytes) 78614413#TMSN.jpeg (1 page)(bytes) PepsiCovKaneta.pdf (9 pages)(346023 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by Overnight Courier on this date.

Signature	/Paul J. Reilly/
Name	Paul J. Reilly
Date	01/14/2009

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

IN THE MATTER OF APPLICATION

Mark : PEP51
Applicant : Bryce Kaneta-Ogata d/b/a/ BKO Enterprises
Serial No. : 77/511,291
Filed : June 30, 2008
Published in
the **Official Gazette** : November 25, 2008

	X	
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PEPSICO, INC.,	:	
	:	
Opposer,	:	Opposition No.
	:	
v.	:	
	:	
BRYCE KANETA-OGATA,	:	:
	:	
Applicant.	:	
	X	

NOTICE OF OPPOSITION

Opposer, PepsiCo, Inc. ("PepsiCo" or "Opposer"), a North Carolina corporation having a place of business at 700 Anderson Hill Road, Purchase, New York 10577 believes that it will be damaged by the registration of application Serial No. 77/511,291, filed on June 30, 2008, in the name of Bryce Kaneta-Ogata d/b/a/ BKO Enterprises (hereinafter "Applicant") for the alleged mark PEP51 based on an intention to use the mark on or in connection with "on-line computer services for storing content items selected by users from Internet web pages" in International Class 39, and having been previously granted an extension of time to oppose, hereby opposes the foregoing application.

The specific grounds for this opposition are as follows:

1. PepsiCo, through its predecessors in interest, has been engaged in the beverage business for well over 100 years and has become well and favorably known to members of the public, as well as to members of the beverage industry, for quality beverage products and related services. It owns a portfolio of brands that identify carbonated soft drinks, juices and juice drinks, ready-to-drink teas and coffee drinks, isotonic sports drinks, bottled water and enhanced waters, and related products and services.

2. For almost a century, PepsiCo has used the mark PEPSI in connection with various beverages and other products, as well as advertising, marketing, sales and promotional services to authorized bottlers and independent distributors and retailers of those products.

3. Since long prior to the filing date of the application-at-issue, PEPSI has been identified with Opposer and has appeared on a tremendous amount of product packaging, advertising, in-store display racks, signage, point-of purchase material, etc.

4. Opposer's PEPSI products are marketed and sold in vast quantities on a nationwide basis, supported by many hundred of millions of dollars of advertising and promotion each year. Opposer's products are sold in almost every supermarket in the United States as well as in mass merchandise stores, numerous convenience stores, vending machines, and other outlets.

5. The extensive commercial acceptance and success of many of Opposer's PEPSI products for nearly 100 years is due in large measure to the substantial advertising and marketing efforts of PepsiCo. Opposer has, by virtue of extensive usage, advertising and promotion, built up a very high level of consumer and trade recognition symbolized by its mark PEPSI and variants. Retail sales of beverage products marketed under Opposer's mark PEPSI and variants in the United States alone have exceeded many billions of dollars.

6. PepsiCo's use of the mark PEPSI and variants, however, extend beyond beverages, per se, and include other products and services. For example, for several years now, PepsiCo has been marketing and selling clothing, drinking vessels, umbrellas, duffel bags and other products under the mark PEPSI. PepsiCo also organizes, markets, promotes and sponsors entertainment and sporting events. In 2006, for example, PepsiCo renewed its sponsorship of Major League Baseball Properties making PEPSI the "Official Soft Drink of Major League Baseball" at least until 2011. PEPSI also sponsors sporting and entertainment facilities, such as PEPSI CENTER in Denver, Colorado.

7. PepsiCo also maintains a very strong and innovative internet presence through which it markets, advertises and promotes many of the foregoing products and services, among others. PepsiCo's websites include, without limitation, PEPSI.COM, PEPSISTUFF.COM, PEPSIDJDIVISION.COM and PEPSICARSHOW.COM which are operational twenty-four hours a day, seven days a week. PepsiCo has used its websites, in part, to also promote various services, contests and promotions, e.g., (i) the PEPSI STUFF promotion enabling consumers to purchase products using PEPSI Points, and (ii) the DESIGN OUR PEPSI CAN competition involving the creation of artwork. Not only does PepsiCo market and promote its own products and services via the PEPSI websites, but also the products and services of others including games, sporting events, athletes, live musical performances, etc. For example, PEPSI.COM offers features such as PEPSI SMASH, which provides music and information about musicians and DIET PEPSI NFL ROOKIE OF THE WEEK, which includes information about football players and allows visitors to vote for a player each week.

8. Due to such extensive and continuous advertising, sale, use and promotion of soft drinks and related products and services under or in connection with Opposer's marks PEPSI and

variants for nearly 100 years, said marks have not only acquired substantial public and consumer recognition throughout the United States, but have also enjoyed valuable goodwill, and become famous, solely signifying Opposer as the source of products and services of high quality.

9. In addition to its prior common law rights in the marks PEPSI and variants, Opposer is also the owner of numerous United States trademark and service mark applications and registrations, each of which incorporate the designation PEPSI or variants, including, but not limited to, the following:

MARK	REG. NO.	REG. DATE	FIRST USE DATE	IDENTIFICATION OF GOODS
PEPSI	824150	Feb. 14, 1967	Nov. 21, 1911	Soft drinks and syrups and concentrates for the preparation thereof
PEPSI-COLA	824151	Feb. 14, 1967	1898	Soft drinks and syrups and concentrates for the preparation thereof
PEPSI and Design	2100417	Sept. 23, 1997	Nov. 1996	Soft drinks
PEPSI and Design	2104304	Oct. 7, 1997	Nov. 1996	Soft drinks
PEPSI EZPAY	2751344	Aug. 12, 2003	April 2, 2003	On-line payment services, namely, the electronic processing and transmission of bill payment information via a global computer network
PEPSI SMASH	3082353	April 18, 2006	June 1, 2005	Entertainment services, namely, providing pre-recorded or live music and information about musical artists on-line via a global computer network

10. Opposer's registrations for these marks are valid, subsisting, in full force and effect, uncanceled and unrevoked, and serve as evidence of Opposer's exclusive right to use such marks in commerce on or in connection with the goods or services identified in the registrations, as provided by Section 33(a) of the United States Trademark (Lanham) Act, 15

U.S.C. § 1115(a). Further, many of Opposer's registrations for the aforesaid marks have become incontestable pursuant to Section 15 of the Lanham Act, 15 U.S.C. § 1065. Hereinafter PepsiCo's foregoing marks, including those registered and/or used in commerce, are referred to individually and/or collectively as the "PEPSI Marks", unless otherwise specified.

11. Use of the PEPSI Marks has been continuous and they have not been abandoned. As a result of the long, extensive and widespread use, advertising, promotion and registration of the PEPSI Marks on and in association with PepsiCo's various goods and services, including, but not limited to, beverages, providing information, music and contests online as well as other internet-based services and marketing efforts, consumers have become accustomed to associate marks consisting of or containing the term "PEPSI" with a single source, that is, PepsiCo.

12. In view of such substantial usage, the PEPSI Marks have become famous and one of the most renowned brands in the United States, representing assets of enormous goodwill and of inestimable value to PepsiCo.

13. On information and belief, on June 30, 2008, Applicant, Bryce Kaneta-Ogata d/b/a BKO Enterprises, having an address at 336 Uilama Place, Hilo, Hawaii 96720, filed Application Serial No. 77/511,291 to register PEP51, based on an intent to use the alleged mark in connection with "on-line computer services for storing content items selected by users from Internet web pages" in International Class 39.

14. Registration of Applicant's alleged mark, which is the subject of the application-in-opposition, is barred by the provisions of Section 2(d) of the Trademark Act of 1946 because the said mark consists of or comprises a mark which so resembles Opposer's PEPSI Marks, including, but not limited to, PEPSI, PEPSI EZPAY and PEPSI SMASH, which have been in use and are also the subject of prior registrations or previously filed applications to register marks in

the United States Patent and Trademark Office, as to be likely, when used in connection with the alleged services of the Applicant to cause confusion, mistake or deception.

15. Opposer has priority over Applicant because Opposer's use, application filing dates and/or registration dates precede the Applicant's filing date for its application at issue and/or any alleged date of first use of Applicant's purported mark which is the subject of the application-in-opposition.

16. Applicant's alleged mark PEP51, which is the subject of the application-in-opposition, and Opposer's PEPSI Marks, including, but not limited to, PEPSI, PEPSI EZPAY and PEPSI SMASH, are similar. On information and belief, the services in connection with which Applicant's alleged mark is intended to be used or applied for and the goods/services in connection with which Opposer's PEPSI Marks are registered and/or used are similar, complementary and/or related. Further, on information and belief, the parties' respective channels of trade are similar, if not identical, and their services/products are marketed to similar consumers.

17. Accordingly, Applicant's alleged mark shown in the application-in-opposition so resembles Opposer's foregoing and previously used and/or registered PEPSI Marks as to be likely to cause confusion, to cause mistake or to deceive with consequent injury to Opposer. The likelihood of confusion, mistake or deception that would also arise from concurrent use and registration of the applied for mark PEP51 with Opposer's use and registration of its PEPSI Marks, including, but not limited to, PEPSI, PEPSI EZPAY and PEPSI SMASH, is that (a) persons are likely to believe that Applicant's services have their source in Opposer, or (b) that Applicant and its services are a version of Opposer's marks or are in some way legitimately

connected or affiliated with, sponsored, approved, endorsed or licensed by Opposer when, in fact, they are not.

18. In view of the foregoing, registration of Applicant's alleged mark PEP51, which is the subject of the application-in-opposition, is barred from registration because it consists of or comprises a mark which so resembles Opposer's previously used and/or registered PEPSI Marks, as to be likely, when used in connection with the alleged services of the Applicant, to cause confusion, mistake or deception.

19. Further, Opposer's inherently distinctive PEPSI Marks became famous prior to the filing date of Applicant's application-in-opposition and/or any claimed date of first use by Applicant of the alleged mark shown in U.S. Application Serial No. 77/511,291. Registration and use of Applicant's alleged mark would likely dilute Opposer's famous and inherently distinctive PEPSI Marks, including, PEPSI, in violation of 15 U.S.C. § 1125(c). Accordingly, Applicant's alleged mark PEP51 is not entitled to registration under 15 U.S.C. § 1052(f) and Section 13 of the Lanham Act, 15 U.S.C. § 1063.

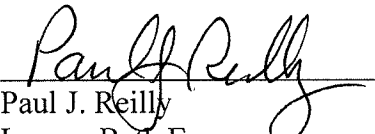
20. PepsiCo will be damaged by the issuance of a registration sought by Applicant within the meaning of 15 U.S.C. §1063 because such registration would support and assist Applicant in the confusing, misleading, deceptive and/or dilutive use of Applicant's alleged PEP51 mark, and would give color of exclusive statutory rights to Applicant in violation and derogation of the prior and superior rights of Opposer.

WHEREFORE, Opposer prays that this opposition be sustained in its favor, that registration be denied to Applicant on its Application Serial No. 77/511,291 and that the Board grant all further relief to Opposer that is necessary and just in these circumstances.

Respectfully submitted,

BAKER BOTTS L.L.P.

Dated: January 14, 2009

By: 
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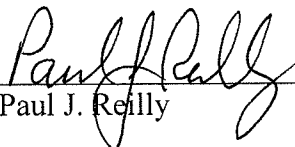
Attorneys for Opposer,
PepsiCo, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, NOTICE OF OPPOSITION, was served on the Applicant via Federal Express courier, in an envelope with sufficient postage addressed to:

BRYCE KANETA-OGATA
336 UILAMA PL
HILO, HI 96720-5932

on January 14, 2009

By: _____
Paul J. Reilly